

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH RUSSO	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Personal Income Tax under Article 22 of the Tax	:	
Law and Chapter 46, Title T of the	:	
Administrative Code of the City of New York for	:	
the Years 1982 and 1983.	:	

Petitioner, Joseph Russo, 219-26 74th Avenue, Bayside, New York 11364, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1982 and 1983 (File No. 806982).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on January 26, 1990 at 9:15 A.M., with all briefs to be submitted by April 20, 1990. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly concluded that petitioner had income subject to New York State and New York City personal income tax during the years 1982 and 1983.

FINDINGS OF FACT

In a letter dated November 7, 1985, the Division of Taxation ("Division") advised petitioner, Joseph Russo, that it was unable to locate his income tax returns for the years 1980 through 1983. The letter asked petitioner to complete the income tax returns which were included with the letter and enclose payment. If petitioner filed returns, the letter requested that petitioner submit copies of the returns and copies of the cancelled checks paying the additional

taxes due or a copy of the refund stub if a refund of tax was made.

The Division issued two notices and demands for payment of income tax due, dated November 20, 1986, to petitioner. One notice assessed a penalty of \$950.00 for the year 1982. The other notice assessed the same amount of penalty for the year 1983. The notices explained that "PENALTY IS IMPOSED UNDER SECTION 685(I) OF THE TAX LAW FOR FAILURE TO SUBMIT INFORMATION REQUESTED IN OUR CORRESPONDENCE."

On or about January 13, 1988, the Division issued a Statement of Audit Changes which, among other things, explained that petitioner had a deficiency of personal income tax for the years 1982 and 1983. The Statement of Audit Changes calculated the deficiency of personal income tax as follows:

"TAX YEAR JURISDICTION STATUS/SPOUSE	1982 N.Y. STATE MFS-H	1982 N.Y. CITY MFS-H	1983 N.Y. STATE MFS-H	1983 N.Y. CITY MFS-H
TOTAL ADJUSTMENT	23589.00	23589.00	26410.00	26410.00
TOTAL INCOME REPORTED/ADJ'D	.00	.00	.00	.00
ADJUSTMENT	24389.00	24389.00	27210.00	27210.00
TOTAL INCOME CORRECTED	24389.00	24389.00	27210.00	27210.00
STANDARD DED CLAIMED/ADJ'D	.00	.00	.00	.00
EXEMPTION(S) CLAIMED/ADJ'D	.00	.00	.00	.00
ADJUSTMENT	800.00	800.00	800.00	800.00
EXEMPTION(S) ALLOWED	800.00	800.00	800.00	800.00
NET INCOME CORRECTED	23589.00	23589.00	26410.00	26410.00
TAXABLE INCOME CORRECTED	26410.00	23589.00	23589.00	26410.00
TAX ON ABOVE	1862.46	618.56	2257.40	735.63
CITY SURCHARGE		30.93		73.56
BALANCE		649.49		809.19
LESS: TAX WITHHELD	.00	.00	-1808.00	-720.00
TAX PREVIOUSLY STATED/ADJ'D	.00	.00	.00	.00
PERSONAL INCOME TAX DUE	1862.46	649.49	449.40	89.19

SECTION 685(A)(1)(A)	419.05	146.14	101.12	20.07
SECTION 685(A)(2)	465.62	162.37	101.12	20.07
SECTION 685(B)(1)	93.12	32.47	22.47	4.46
SECTION 685(C)	125.00	41.00	22.00	1.00
TOTAL PENALTY	1102.79	381.98	246.71	45.60
TOTAL INTEREST	944.85	329.51	168.74	33.49
TOTAL DUE	3910.10	1360.98	864.85	168.28"

The Statement of Audit Changes explained that penalties were asserted pursuant to Tax Law § 685(a)(1) and (2) for failure to file a tax return when due and failure to pay tax when due. The Division also asserted a penalty pursuant to Tax Law § 685(b) for negligence and/or intentional disregard of the Tax Law. Lastly, the Division asserted penalties for underestimation of New York State and New York City personal income tax.

Handwritten notes on the audit report indicate that the Division calculated the amount of income attributed to petitioner for 1982 by subtracting an amount of income attributed to petitioner for 1980 of \$18,747.00 from an amount of income attributed to petitioner in 1981 of \$21,568.00 for a difference of \$2,821.00. The difference was then added to the 1981 amount to calculate an amount of income in 1982 of \$24,389.00.¹ There is nothing in the record to indicate the source or nature of the income attributed to petitioner for 1980 and 1981.

The amount of wage income attributed to petitioner for the year 1983 was based on a wage and tax statement from Westchester Farms, Inc.

which reported that petitioner received income subject to tax. The wage and tax statement stated that petitioner received "Wages, Tips, Other Compensation" of \$27,210.09.

In a letter dated February 12, 1988, petitioner advised the Division that he disagreed with the Division's findings and stated, among other things, that he did not engage in any

¹At the hearing, the auditor testified that he believed that the Division estimated petitioner's 1982 income by adding the difference in "actual" earnings between 1983 and 1984 to the 1978 earnings. There is nothing in the record to reconcile the Notice of Deficiency to the auditor's testimony. The documentary evidence supports the method outlined in Finding of Fact "5".

"taxable activity".²

The Division of Taxation ("Division") issued a Notice of Deficiency dated April 12, 1988 to petitioner, which asserted a deficiency of New York State and New York City personal income tax for the years 1982 and 1983. The notice stated that additional tax was due in the amount of \$3,050.54 plus penalty of \$1,785.16 and interest of \$1,549.79 for a total amount due of \$6,385.49.

In a letter dated November 22, 1988, the Division advised petitioner that it considered its position correct because:

"[a] review of our records show you were employed by Westchester Farms, Inc., and received wages which are subject to tax. Your protest has been dealt with time and time again by the Federal Tax Courts which have found such protests to be frivolous and without merit."

On or about May 30, 1989, petitioner filed a petition with the Division of Tax Appeals wherein he argued (1) that there is no jurisdiction over him; (2) that there is no basis to conclude that he engaged in an activity subject to tax; (3) that he is not a "taxpayer" because he is not subject to tax; (4) that the income tax is an indirect tax which is in the nature of an excise tax and that an income tax can not be imposed upon an individual or an individual's exercise of a natural right secured by the constitution of the United States or New York State; (5) that his employers have falsely advised state and Federal agencies that he engaged in activities subject to tax; and (6) that the earning of compensation does not create a tax liability.

During the period in issue, petitioner was married and lived in a household consisting of his wife and three children. In 1982, the children were 22, 20 and 11 years old. At the hearing, petitioner was unable to state whether any of his children were dependent upon him for support. He also did not recall if his wife was employed in 1982.

²At the hearing, the Division's representative stated that this letter was accepted as the original petition.

It was revealed at the hearing that during the years 1982 and 1983, petitioner was employed by Westchester Farms, Inc. as a clerk. He was compensated by his employer for his services.

SUMMARY OF PETITIONER'S POSITION

At the hearing, petitioner argued that the Division did not have any basis to conclude that petitioner had any income subject to tax. In his post-hearing brief, petitioner also argued that the mere earning of compensation does not create a tax liability.

CONCLUSIONS OF LAW

A. Before proceeding to the merits of this matter, petitioner's jurisdictional objection will be addressed. The jurisdiction of the Division of Tax Appeals to resolve disputes is set forth in Tax Law Article 40 (L 1986, ch 282, effective September 1, 1987). Section 2000 of the Tax Law provides, in part, "[t]he division shall be responsible for processing and reviewing petitions, providing hearings as prescribed pursuant to this chapter or as a matter of right where the right to a hearing is not specifically provided for, modified or denied by another provision of this chapter...." Section 689 of the Tax Law specifically provides for a hearing to challenge a notice of deficiency. Therefore, the petition to challenge the notice of deficiency is properly brought in this forum.

B. The petition in this matter lists only the assessment number which is on the notice of deficiency and makes no reference to the notices and demands for payment of income tax due dated November 20, 1986. Accordingly, no issues have been raised for discussion with respect to the notices and demands. It is noted that if such issues had been raised, they could not be resolved at this juncture because the Tax Law does not provide a taxpayer with the right to petition a notice and demand (Matter of Albert Florence Dreisinger, Tax Appeals Tribunal, July 20, 1989). Therefore, no ruling is made herein with respect to the notices and demands.

C. There is a presumption of correctness of a notice of deficiency which has been properly issued under the Tax Law (Matter of Tavolacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174). A taxpayer who fails to present any evidence to show that the notice of

deficiency is incorrect surrenders to this presumption (Matter of Tivolacci v. State Tax Commn., supra). In certain cases, however, there is an exception that requires the government to establish at the outset that the assessment has a rational basis before the presumption of correctness arises (see, Matter of Fortunato, Tax Appeals Tribunal, February 22, 1990). In those instances where the exception applies and the government fails to show that the assessment has a rational basis, the assessment may be found to be arbitrary despite the taxpayer's failure to establish that the assessment is incorrect (Matter of Fortunato, supra). In this matter, as in Matter of Fortunato (supra), it is unnecessary to determine whether the exception applies because the record is devoid of any evidence that the notice for the year 1982 had a rational basis.

D. At the hearing, the auditor testified he believed that in order to estimate petitioner's income for 1982, the Division added the difference in "actual" earnings between 1983 and 1984 to the 1978 earnings. On the other hand, handwritten notes in the record indicate that the Division subtracted an amount attributed to petitioner for 1980 of \$18,747.00 from an amount attributed to 1981 of \$21,568.00 for a difference of \$2,821.00. This difference was then added to the 1981 figure to estimate 1982 income of \$24,389.00. The problem presented is that there is no information in the record as to the source of the figures for 1980 and 1981, what the figures for 1980 and 1981 represent or whether the figures for 1980 and 1981 bear any relationship to the year 1982. Since the record does not establish any basis for the Division's conclusion that petitioner had taxable income in 1982, the portion of the Notice of Deficiency pertaining to 1982 is cancelled (cf. Matter of Stephen Fortunato, supra).³

E. For the year 1983, the Division premised its notice of determination upon a wage and tax statement for the same year which listed "Wages, Tips, Other Compensation" of \$27,210.09 from Westchester Farms, Inc. Thus, the question becomes whether this information provides a

³It is recognized that in Matter of Fortunato (supra) the Division did not ask the petitioner for any information. This distinction does not seem determinative because the controlling principle in that case, as here, is that the notice must have a rational basis.

rational basis to determine that petitioner is liable for personal income tax.

Section 61 of the Internal Revenue Code provides that, except as otherwise provided, gross income includes all income from whatever source derived including compensation for services. This definition includes amounts received by an individual for personal services (Cardinalli v. Commr., 39 TCM 514, affd 649 F2d 866 [9th Cir 1981]). It has been held that the imposition of an income tax on salary for personal services "is not unconstitutional for any reason and does not violate due process of law" (Cardinalli v. Commr., supra; see also, Matter of Kalfas, State Tax Commn., May 29, 1985; Matter of Lampe, State Tax Commn., December 31, 1984). None of the arguments raised by petitioner warrant a different conclusion.

Under both Federal and New York State Law, employers are required to furnish employees with a Wage and Tax Statement showing the amount of remuneration paid to the employee during the year (IRC § 6051[a]; Tax Law § 672). Therefore, since there is no question that these amounts are subject to tax (Cardinalli v. Commr., supra; Matter of Kalfas, supra; Matter of Lampe, supra), it was rational and proper for the Division to premise the portion of the Notice of Deficiency for the year 1983 on the wage and tax statement for petitioner (see, Matter of Denn, Tax Appeals Tribunal, October 25, 1990).

In view of the fact that the Notice of Deficiency has a rational basis and petitioner has not presented any evidence to sustain his burden of proof to show that the amount asserted to be due was in error (Tax Law § 689[e]), there is no basis to modify the asserted deficiency of tax for the year 1983.

F. The petition of Joseph Russo is granted only to the extent of Conclusion of Law "D", and the Division is directed to modify the Notice of Deficiency issued April 12, 1988

accordingly; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE